IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

THURSDAY, THE 22ND FEBRUARY 2007 / 3RD PHALGUNA 1928

CRL.A.No. 1596 of 2006(A)

SC.1052/2001 of SPL.COURT (NDPS ACT CASES), TRIVANDRUM
CP.234/2000 of JUDL. MAGISTRATE OF FIRST CLASS COURT-II,NEYYATTINKARA

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APPELLANT:

SASI @ KUTTAN,
C.NO.486, CENTRAL PRISON,
TRIVANDRUM.

BY ADV. ADV.C.T.JESTIN(STATE BRIEF)

RESPONDENTS:

STATE OF KERALA, REPRESENTED BY A
PUBLIC PROSECUTOR.

BY PUBLIC PROSECUTOR SRI.K.S.SIVAKUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 22/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

V. RAMKUMAR, J.

Crl. Appeal No. 1596 OF 2006 A

Dated this the 22nd day of February, 2007

J U D G M E N T

In this appeal preferred from the Central Prison, Thiruvananthapuram, the appellant, who was the accused in the Sessions Case No.1052/2001 on the file of the Additional Sessions Court for the Trial of Abkari Act cases, Neyyattinkara, challenges the conviction entered and the sentence passed against him for an offence punishable under section 58 of the Abkari Act.

2. The case of the prosecution is that on 26.6.1998 at about 11 a.m. on the eastern shore of Asari pond at Chenkalpakuthi in Keezhkolla Desom the accused was found pouring illicit arrack from a black jerry can of 5 liters capacity into a bottle having capacity of 750 ml. and the accused has thereby committed an offence punishable under section 58 of the Abkari Act.

3. On the accused pleading not guilty to the charge framed against him by the court below for the aforementioned offence, the prosecution was permitted to adduce evidence in support of its case. The prosecution altogether examined five witnesses as PWs 1 to 5 and got marked seven documents as Exhibits P1 to P7 and one material object as MO1.

4. After the close of the prosecution evidence, the accused was questioned under section 313(1)(b) Cr.P.C. with regard to the incriminating circumstances appearing against him in the evidence for the prosecution. He denied those circumstances and maintained his innocence.

5. Since the trial court did not consider this a fit case for recording an order of acquittal under section 232 Cr.P.C., the appellant was called upon to enter on his defence and to adduce any evidence which he might have in support thereof. He did not adduce any defence evidence.

6. The learned Additional Sessions Judge after trial, as per judgment dated 7.4.2006 found the appellant guilty of the offence and sentenced him to undergo rigorous imprisonment for two years and to pay a fine of Rs.1 lakh and on default to pay the fine, to suffer rigorous imprisonment for three months. It is the said judgment which is assailed in this appeal.

7. I heard Advocate Sri.C.T.Jestin, the learned counsel who defended the appellant on State Brief and Advocate Sri. K.S.Sivakumar, the learned Public Prosecutor who defended the State.

8. The only point which arises for consideration in this appeal is as to whether the conviction entered and the sentence passed against the appellant are sustainable or not.

The point:

9. PW1 is one of the independent witnesses who had attested Ext.P1 mahazar prepared by the Detecting Officer. Eventhough he admitted his signature in Ext.P1 mahazar, he turned unfriendly to the prosecution. PW2 is the Excise Guard, who had accompanied the Detecting Officer. PW3 is the Assistant Excise Inspector, Amaravila, who detected the offence and effected the arrest, search and seizure and registered Ext.P3 crime and occurrence report. PW4 is the Excise Inspector, who conducted the investigation and laid the charge before court. PW5 is the Thondi Section Clerk attached to the JFCM-II, Neyyattinkara.

10. After hearing both sides and after bestowing my anxious consideration of the oral and documentary evidence in the case, I am not satisfied that the prosecution has succeeded in bringing home the guilt of the appellant beyond reasonable doubt.

11. Going by the evidence of PWs 2 and 3, the accused was found pouring the contents of the black jerry can of 5 liters capacity into a MO1 bottle having a capacity of 750 ml. It was at this juncture that the excise party came and arrested the accused and seized the jerry can as well as the bottle together with their contents. Eventhough the testimony of PW3 coupled with recitals in Exhibit P1 contemporaneous mahazar prepared by PW3 from the spot itself would show that after seizure of

the jerry can as well as the 750 ml. bottle, PW3 had sealed both the properties, Ext.P5 property list does not show that the 5 liter jerry can and the 750 ml. bottle allegedly containing the contraband liquor were sealed. There is an endorsement on Ext.P5 by the Magistrate ordering items 1 and 2 to be kept in the Amaravila Excise Range until further orders. The prosecution relies on Ext.P6 report of chemical analysis dated 26.2.1999 to show that two samples each of 150 ml. taken from the bulk quantity seized in this case were found to contain Ethyl Alcohol and, therefore, the accused was found in possession of illicit arrack. PW5 is the Thondi Section Clerk who was examined to prove the alleged sampling. Except stating from the witness box that as per the orders of the Magistrate it was he who had extracted the sample from the properties received in court Ext.P7 true extract of page No.108 of the Thondi Register PW5 had no contemporaneous record to substantiate the same. He frankly confessed that Ext.P7 which is the certified extract of the relevant page of the Property Register does not contain any direction by the Magistrate to take sample nor the factum of sampling. PW5 did not depose whether he had drawn two samples each of 150 ml. nor did he give the date of the alleged sampling said to have been done by him. The 5 liter jerry can and the 750 ml. bottle were both produced in court on 26.6.1998 and on the same day the Magistrate had ordered their entrustment with the Excise Inspector, Amaravila until

further orders. If the said order of the Magistrate had been complied with, then there was no occasion thereafter for PW5 to draw samples therefrom, assuming that the jerry can and bottle which were produced on 26.6.1998 were the same which were seized and labelled by PW3. That apart, going by the endorsement on Ext.P7 it was an Excise Guard by name K.Ratnakaran who was entrusted with the samples. This was on 26.11.1998. Ext.P6 report of chemical analysis shows that the said Ratnakaran brought two samples along with a letter dated 26.11.1998 of JFCM-II, Neyyattinkara. Ext.P6 certificate further shows that the liquid contained in one of the samples was having 13.66% by volume of Ethyl Alcohol, whereas the liquid contained in the other sample had 50.54% by volume of Ethyl Alcohol. Going by the testimony PWs 2 and 3 and the recitals in Ext.P1 mahazar, the accused was apprehended at a time when he was pouring the liquid contained in the jerry can into the bottle. If so, the strength of Ethyl Alcohol contained in both the jerry can as well as the bottle should have been the same. The prosecution has absolutely no explanation as to why such a variation in the percentage of Ethyl Alcohol was seen in the contents of the jerry can and the bottle assuming that the two samples which were drawn were taken from the jerry can as well as the bottle. In the face of such material, it cannot be conclusively held that the samples which were analysed under Ext.P6 certificate were the samples drawn from the jerry can and bottle

allegedly seized from the accused particularly in the face of the evidence already adverted to show that the jerry can as well as the bottle, which were produced in court, were not sealed, whereas the properties which were allegedly seized by PW3 under Ext.P1 mahazar were both sealed. The conviction recorded by the court below overlooking these vital aspects of the matter cannot, therefore, be supported and are accordingly dislodged.

12. The appellant is, therefore, found not guilty of the offence punishable under section 58 of the Abkari Act and is acquitted thereunder. He is set at liberty. He shall be released from prison forthwith unless his continued detention is found necessary in connection with any other case against him.

In the result, this Criminal Appeal is allowed. The conviction entered and the sentence passed against the appellant are set aside as above.

(V. RAMKUMAR, JUDGE)

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V. RAMKUMAR, J.

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GIST OF THE J U D G M E N T

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22nd February, 2007